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21(1)(a), 21(1)(b)

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Page 4

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14, 21(1)(a), 21(1)(b)

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21(1)(a), 21(1)(b)

**of the Access to Information Act
de la Loi sur l'accès à l'information**

Levman, Nathalie

From: Ouellette, Jacinthe
Sent: 2016-Mar-22 10:56 AM
To: Lidstone, Bonnie
Cc: * CLP SGC/Admin; Glushek, Phaedra; Morency, Carole; Levman, Nathalie; Vaillant, Maryse
Subject: 2016-005605: Minister Meeting with Pivot Legal Society - Request for ES BN TPs (Bill C-36)
Attachments: Pivot tasking March 29.pdf; BNPivotExecSummaryMarch'16revisedMarch21.docx; BNPivotMarch'16revisedMarch21.docx; TPsPivotMarch'16.docx

Importance: High

Approved by / approuvé par Carole Morency, DG and SGC, CLPS.

- Bonnie, can you advise if you need a hard copy. Thank you

Jacinthe Ouellette

Executive Assistant / Adjointe exécutive
613-957-4951

From: Lidstone, Bonnie
Sent: Wednesday, March 16, 2016 12:24 PM
To: * CLP SGC/Office; Scott, Amanda J.; Gauvreau, Michael
Cc: Lidstone, Bonnie; Willans, Carole; Fong, Judy
Subject: Minister Meeting with Pivot Legal Society - Request for BN + TPs + Executive Summary
Importance: High

Colleagues,

The Minister will be meeting with Pivot Legal Society on March 29 (please see attached for letter and email from Pivot dated January 21).

We have been asked to coordinate the preparation of briefing materials for this meeting.

Pivot would like to discuss the following with the Minister, for which briefing materials will be needed:

- 1) **Prostitution laws and the *Protection of Communities and Exploited Persons Act* (Bill C-36), including the barriers, in terms of health, safety and human rights, that sex workers continue to face under the new legislation (CLPS)**
- 2) **Legal Reforms that will increase access to harm reduction and addiction treatment more broadly in Canada, including reforms to the *Respect for Communities Act* (Bill C-2) (YJSIS in coordination with the LSU at Health Canada, and CLPS, with reference also to Bill C-224, Good Samaritan Drug Overdose PMB)**

Please see the attached correspondence from Pivot for more details.

Attached are the templates for your use:

- Executive Summary
- BN
- TPs

The MLU has advised that in the preparation of your briefing materials, you may need to coordinate with the Public Law and Legislative Services Sector (PLLSS), and the contact person there is Judy Fong, Counsel with the Human Rights Law Section.

The CCM# for this request is: **2016-005605**

The deadline for the briefing materials is: **Friday March 18 by noon if at all possible** (note that I have to send the package up the approval process Friday/Monday).

Please send the DG / SGC approved materials to me, and I will send them up through SADMO.

Thank you in advance for your work on this.

Bonnie

Bonnie Lidstone, B.A., LL.B.

Principal Analyst, Intergovernmental and External Relations Division
/ Analyste principale, Division des relations intergouvernementales et externes
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From: Ministerial Liaison Unit

Sent: March-15-16 9:26 AM

To: * SADMO/Admin

Cc: Ministerial Liaison Unit; * MLU Group; Ihsanullah, Uzma; Desbiens, Alex; van Rooijen, Vanessa

Subject: ACTION REQUEST 2016-005605 Meeting with Pivot Legal Society

ACTION REQUEST / FICHE DE SERVICE

<u>MLU # / # ULM</u>	<u>Due in MLU / Date limite</u>	<u>At / À</u>
2016-005605		
<u>Topic / Sujet</u> Meeting with Pivot Legal Society		
<u>Request / Demande</u> Please consult with PLLSS to prepare briefing materials for the Minister's meeting with Pivot Legal Society on Tuesday, March 29. Please find attached a letter from the Society. Please note that briefing notes should be limited to one to two pages, when possible, with additional information annexed to the note. The general templates posted on JUSnet should be used. Please use the MLU # mentioned above , and make sure that the CCM fields are accurate and are filled accordingly. Please forward the electronic version (up to Protected B) of the briefing note to MLU-ULM@justice.gc.ca , or "Ministerial Liaison Unit" in the Global Address List. For material containing secret or cabinet confidence information, please bring the documents on a secure USB key to EMB 4262 or 4228. If you have any questions concerning this request, please do not hesitate to contact the MLU.		

Veuillez noter que les notes d'information devraient se limiter à une ou deux pages, et toute information additionnelle devrait être jointe à la note en annexe. Les gabarits à utiliser se retrouvent sur le site intranet JUSnet. **Veuillez utiliser le # ULM mentionné ci-dessus**, et s'assurer que tous les champs de CCM sont adéquats et complétés en conséquence.

Veuillez transmettre la version électronique (jusqu'à Protégé B) de la note d'information à l'adresse MLU-ULM@justice.gc.ca, or "Ministerial Liaison Unit" dans la liste d'adresses globales. Si le matériel contient de l'information secrète ou confidence du cabinet, veuillez apporter les documents par clef USB au EMB 4262 ou 4228. N'hésitez pas à contacter l'ULM pour tout complément d'information à ce sujet.



NUMERO DU DOSSIER/FILE #: 2016-005605

COTE DE SECURITE/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: Bill C-36, the *Protection of Communities and Exploited Persons Act*

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- In late March 2016, you are scheduled to meet with Pivot Legal Society, a Vancouver-based NGO that supports decriminalization of adult prostitution. Pivot intends to discuss their position against former Bill C-36, the *Protection of Communities and Exploited Persons Act*, which implemented a criminal law approach to prostitution in December 2014 (Canada's "Nordic Model").
- You have committed to review the adequacy of former Bill C-36 in responding to all the issues identified by the Supreme Court of Canada's December 2013 *Bedford* decision, as well as to monitor the impact of these reforms. You have also indicated that the Government will be consulting those most affected by the new legislation in undertaking this review, including sex workers.

-

Soumis par (secteur)/Submitted by (Sector): Policy Sector

Responsable dans l'équipe du SM/Lead in the DM Team: _____

Revue dans l'ULM par/Edited in the MLU by: _____

Soumis au CM/Submitted to MO:



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FOR INFORMATION

2016-005605

MEMORANDUM FOR THE MINISTER

Bill C-36, the *Protection of Communities and Exploited Persons Act*

ISSUE

In late March 2016, you are scheduled to meet with Pivot Legal Society, a Vancouver-based NGO that supports decriminalization of adult prostitution. Pivot intends to discuss their position against former Bill C-36, the *Protection of Communities and Exploited Persons Act*, which implemented a criminal law approach to prostitution in December 2014.

BACKGROUND

On December 20, 2013, the Supreme Court of Canada (SCC) rendered its decision in *Bedford* and held that three *Criminal Code* prostitution provisions violated section 7 of the *Charter* because they prevented prostitutes from taking steps to protect themselves when engaged in a risky but legal activity. In a similar British Columbia action, *Downtown Eastside Sex Workers United Against Violence Society (DESWUAV)*, the SCC granted the claimant, a group representing street-based sex workers from Vancouver's Downtown Eastside, public interest standing (September 2012). In light of the result in *Bedford*, that action was ultimately abandoned. Katrina Pacey, executive director of Pivot Legal Society, was counsel for street-based sex workers in both *Bedford* and *DESWUAV*.

The *Protection of Communities and Exploited Persons Act* (former Bill C-36), which came into force on December 6, 2014, responds to the *Bedford* case by treating prostitution as a form of sexual exploitation of primarily women and girls (often referred to as a version of the "Nordic Model", first implemented in Sweden in 1999).

The *Protection of Communities and Exploited Persons Act*

Bill C-36 criminalizes:

- the purchase of sexual services (section 286.1 of the *Criminal Code*), which makes prostitution illegal (the Bill immunizes sellers of sexual services from prosecution for the role they play in the now illegal prostitution transaction);
- receiving a material benefit from the prostitution of others (section 286.2);
- procuring others to provide sexual services (section 286.3);
- advertising the sale of others' sexual services (section 286.4); and,
- communicating for the purpose of selling sexual services in public places that are or are next to school grounds, playgrounds and day care centres (subsection 213(1.1)).

These new offences replaced old offences that criminalized bawdy houses (section 210), procuring (section 212) and communicating in public places for the purposes of purchasing or

s.21(1)(b)

selling sexual services (paragraph 213(1)(c)). Two offences (paragraphs 213(1)(a) and (b)), which pre-date Bill C-36 and were not at issue in *Bedford*, continue to apply. They prohibit stopping motor vehicles/impeding the free flow of pedestrian or vehicular traffic for the purpose of selling or purchasing sexual services.

Bill C-36 also contains some minor amendments to the human trafficking offences (sections 279.01 to 279.03) to ensure a consistent approach to both prostitution and human trafficking for sexual exploitation, which Bill C-36 treats as related criminal conduct. Notably, in trafficking for sexual exploitation cases, both trafficking in persons and prostitution charges are frequently laid, among others (see below).

Justice Canada's Bill C-36 Technical Paper¹ explains the intended scope of Bill C-36's offences, its legislative objectives and the evidence considered in developing the Bill. It was tabled before both the House of Commons Committee on Justice and Human Rights and the Senate Committee on Constitutional and Legal Affairs and forms part of the Parliamentary record on Bill C-36.

Complementary funding

To complement Bill C-36's reforms, the Government has dedicated \$20M in new funding to support a range of social programming for those who wish to leave prostitution. This dedicated funding has been allocated through existing Justice Canada and Public Safety Canada funds to various non-governmental organizations, many of which supported Bill C-36's overall approach, as well as to certain police forces. For example, to date, thirteen non-governmental organizations are receiving funding through the Victims Fund to support their projects, which began in fiscal year 2014-2015, totaling \$8.7M over the five years of the initiative. As well, 10 law enforcement agencies are also being funded over the initiative's five years, totaling \$0.7M.

¹ Originally published in July 2014, updated in December 2014, and available online:
<http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/protect.pdf>.

s.14

s.21(1)(a)

s.21(1)(b)

International Debate on Prostitution

Prostitution and the legal responses to it remain a divisive and controversial issue both within Canada and internationally. Some view prostitution as legitimate work, which should be decriminalized and regulated (i.e., supporters of decriminalization or legalization), while others view it as a form of sexual exploitation of women and girls, which must be ended (i.e., supporters of abolition, or the “Nordic Model”). Conflicting values of autonomy (i.e., protecting an individual’s right to choose to sell their own sexual services by allowing sex work) vs. the public good (i.e., protecting the vulnerable people that research shows are drawn to prostitution by disallowing all sex work) drive the debate.

Both internationally and domestically, the prostitution debate generally centres on whether decriminalization or abolition is the appropriate legal response:

- **Decriminalization:** involves the repeal of prostitution-related criminal law, leaving in place criminal laws of general application and other laws to deal with the industry. While some minimum level of prostitution-specific regulations may be implemented, the objective is to treat prostitution like any other occupation and thereby reduce the risks and harm associated with it (implemented in New Zealand and some Australian states, e.g., Australian Capital Territory).
- **Abolition (“Nordic Model”):** involves criminalizing those who “exploit” sellers of sexual services (clients and third parties) and decriminalizing sellers themselves, who are viewed as victims and assisted through new funded programs. This approach seeks to reduce the demand for sexual services, which is viewed as directly linked to human

s.21(1)(a)

s.21(1)(b)

s.23

trafficking for sexual exploitation (implemented in Sweden in 1999, Norway and Iceland in 2009, and Canada in 2014).



Available Research

Evidence, including both quantitative and qualitative research, exists to support both decriminalization and abolition. This evidence informed the development of Bill C-36 and is referenced in Justice Canada's Technical Paper, including a research report commissioned by Pivot Legal Society entitled, "Criminalization of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study". This report, published in the British Medical Journal (BMJ) Open and released on June 3, 2014 while Bill C-36 was being studied by Parliament, studied a small sample of Vancouver-based sex workers (31 persons), over a short period of time (11 months), under the previous approach to prostitution, and concluded that criminalizing the purchase of sexual services would endanger sex workers.



² <https://bccia.org/wp-content/uploads/2014/07/LetterC36.pdf> ; <http://www.straight.com/news/74235/open-letter-calls-nordic-approach-prostitution-canada> .

³ "The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime" (paragraph 165 of the SCC's 2013 *Bedford* decision).

s.21(1)(a)

s.21(1)(b)

s.23

PREPARED BY
Nathalie Levman
Counsel
Criminal Law Policy Sector
613-948-7420



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2016-005605

Talking Points

Meeting with Pivot Legal Society; 201 Bill C-36, the *Protection of Communities and Exploited Persons Act*

- **First, I would like to thank Pivot Legal Society for the important contributions you have made to the debate surrounding adult sex work. These contributions include Pivot's testimony before the Senate Committee on Legal and Constitutional Affairs when it studied former Bill C-36, the *Protection of Communities and Exploited Persons Act*.**
- **I am aware of your organization's concerns about Canada's current legal response to adult sex work, as enacted by former Bill C-36.**
- **I want to reassure you that my officials are reviewing all the available evidence on this issue to ensure that Canada's approach is evidence-based.**
- **You may also know that I have committed to review the adequacy of former Bill C-36 in responding to all the issues identified by the Supreme Court of Canada's December 2013 *Bedford* decision. As you know, that decision found previous prostitution laws unconstitutional because they prevented sex workers from taking steps to protect themselves when engaging in a risky but legal activity.**
- **We are committed to monitoring the impact of former Bill C-36, and will be engaging those most affected by the new legislation in undertaking this review.**

s.21(1)(a)

s.21(1)(b)



PREPARED BY
Nathalie Levman
Counsel
Criminal Law Policy Sector
613-948-7420

s.21(1)(a)

Levman, Nathalie

s.21(1)(b)

From: Martin, Karen
Sent: 2015-Nov-23 9:47 AM
To: Douglas, Michelle
Cc: McIntyre, Janet; Levman, Nathalie; Tremblay, Mylène; * CLP SGC/Admin; Glushek, Phaedra; Morency, Carole; Vaillant, Maryse
Subject: URGENT: 2015-012866 - BN for Minister - [REDACTED]
Attachments: [REDACTED]
Importance: High

Approved by / approuvé par Carole Morency, DG and SGC, CLPS. A hard copy will be provided to your office shortly.

Karen Martin
Administrative Officer | Agente administrative
Senior General Counsel's Office | Bureau de l'avocat général principal
Criminal Law Policy Section | Section de la politique en droit pénal
284 Wellington Street, EMB 5107 | 284 rue Wellington, ECE-5107
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Government of Canada | Gouvernement du Canada

From: Douglas, Michelle
Sent: November 20, 2015 11:29 AM
To: * CLP SGC/Office; Levman, Nathalie; Tremblay, Mylène
Cc: * SADMO/Admin; McIntyre, Janet
Subject: Request for a BN & TPs for the Minister [REDACTED]

Hello,

The SADM has asked that a BN and TPs be prepared for our Minister [REDACTED]
[REDACTED]

The material is requested to support the Minister at her upcoming (November 26th) meeting with her New Zealand counterpart, Attorney General Christopher Finlayson.

[REDACTED]

The CCM # is 2015-012866. The deadline for the Monday morning – however, I would like to discuss this further to give greater context for the request.

Thanks,
Michelle
957-4731

Director / Directrice
International Relations /

Relations internationales
Department of Justice / Ministère de la justice
tel./tél.: (613) 957-4731
Mobile: (613) 796-1424
michelle.douglas@justice.gc.ca
Government of Canada/Gouvernement du Canada

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**of the Access to Information Act
de la Loi sur l'accès à l'information**

Levman, Nathalie

From: Valin, Martine
Sent: 2015-Nov-26 5:30 PM
To: * SADMO/Admin
Cc: Levman, Nathalie; Vaillant, Maryse; * CLP SGC/Admin
Subject: FW: 2015-013697- URGENT ACTION REQUEST: Bedford and C-36 briefing note
Attachments: BNBillC-36ESNov'15.docx; Annex 2 Implementation of Bill C36.docx; BNBillC-36Nov'15.docx

Approved by / approuvé par Carole Morency, Director General and SGC – the hard copy will be delivered to your office shortly.

Martine Valin

Adjointe exécutive /Executive Assistant
Politique en matière de droit pénal / Criminal Law Policy
284 Wellington Street, Room 5093
Justice Canada
Ottawa, Ontario K1A 0H8
Tel: (613) 948-7423
Fax: (613) 957-6374
martine.valin@justice.gc.ca

From: Ouellette, Jacinthe
Sent: November 26, 2015 4:51 PM
To: Levman, Nathalie
Cc: * CLP SGC/Admin; Vaillant, Maryse; Glushek, Phaedra; Morency, Carole
Subject: 2015-013697- URGENT ACTION REQUEST: Bedford and C-36 briefing note

Made formatted changes. With Carole for approval.

From: Hébert, Nathalie
Sent: November 26, 2015 11:57 AM
To: * CLP SGC/Office
Cc: * SADMO/Admin
Subject: FW: UPDATED - URGENT ACTION REQUEST: Bedford and C-36 briefing note
Importance: High

Please see revised due date. They are asking that this be provided today if at all possible but it should be material that already exists. Please advise as to when you will be in a position to provide to SADMO so that we may advise MLU.

Thanks,
Nathalie

From: Ministerial Liaison Unit
Sent: 2015-Nov-26 11:50 AM
To: * SADMO/Admin; * CLP SGC/Office
Cc: Ministerial Liaison Unit; Gauthier, Julie
Subject: UPDATED - URGENT ACTION REQUEST: Bedford and C-36 briefing note

Good morning,

I have received word that the due date has been confirmed – please have the above-mentioned briefing note to MLU by end of day today, if possible. If this is unfeasible, please submit no later than 10AM tomorrow, Friday the 27th.

Thank you.

MLU # / # ULM 2015-013697	Due in MLU / Date limite 26/11/2015	At / À Noon
Topic / Sujet Bedford and C-36		
Request / Demande Please prepare a briefing note, for information , regarding <i>Bedford</i> and C-36. The BN should include any monitoring or information the Department has available since the coming into force of C-36. It should also include the technical paper, as an Annex. Please note, as well, that a briefing on this subject is currently scheduled for next week.		
Please note that briefing notes should be limited to one to two pages, when possible, with additional information annexed to the note. The general templates posted on JUSnet should be used. Please use the MLU # mentioned above , and make sure that the CCM fields are accurate and are filled accordingly.		
Please forward the electronic version (up to Protected B) of the briefing note to MLU-ULM@justice.gc.ca , or "Ministerial Liaison Unit" in the Global Address List. For material containing secret or cabinet confidence information, please bring the documents on a secure USB key to EMB 4262 or 4228. If you have any questions concerning this request, please do not hesitate to contact the MLU.		
In addition, please make use of the attached templates.		
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Matthew Ayling

Student / Étudiant

Cabinet/Parliamentary Affairs Unit / Unité des affaires du Cabinet/Parlement

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s.14



Department of Justice
Canada


Ministère de la Justice
Canada

s.21(1)(b)

NUMERO DU DOSSIER/FILE #:2015-013697
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: *Bedford and Bill C-36, the Protection of Communities and Exploited Persons Act*

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- This note provides information on Bill C-36, the *Protection of Communities and Exploited Persons Act*, which responds to the Supreme Court of Canada's (SCC) 2013 *Bedford* case.
- In its December 20, 2013, *Bedford* decision, the SCC held that three key *Criminal Code* prostitution offences violated section 7 of the Charter (life, liberty and security of the person) on the basis that they prevented prostitutes from taking steps to protect themselves when engaged in a risky but legal activity.
- Bill C-36, which came into force on December 6, 2014, treats prostitution as a form of sexual exploitation of primarily women and girls (i.e., a version of the "Nordic Model," an abolitionist approach to prostitution). The Department of Justice's Technical Paper, which explains the objectives of the Bill and the scope of its offences and references the evidence that informed Bill C-36's development, is attached as Annex 1.
- 
- Prostitution is a divisive and controversial issue; Bill C-36 was hotly debated in Parliament and continues to engender significant disagreement among stakeholders, who either support decriminalization (i.e., repeal of Bill C-36) or abolition (i.e., Bill C-36's overall approach).

Soumis par (secteur)/Submitted by (Sector):

Policy Sector

Responsable dans l'équipe du SM/Lead in the DM Team:

Sarah Geh

Revue dans l'ULM par/Edited in the MLU by:

Olivier Cullen

Soumis au CM/Submitted to MO: November 27, 2015



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FOR INFORMATION

2015-013697

MEMORANDUM FOR THE MINISTER

Bedford and Bill C-36, the Protection of Communities and Exploited Persons Act

ISSUE

This note provides information on Bill C-36, the *Protection of Communities and Exploited Persons Act*, which responds to the Supreme Court of Canada's (SCC) 2013 *Bedford* decision.

BACKGROUND

Bedford decision

In its December 20, 2013, *Bedford* decision, the SCC held that three key *Criminal Code* prostitution offences violated section 7 of the Charter (life, liberty and security of the person) on the basis that they prevented prostitutes from taking steps to protect themselves when engaged in a risky but legal activity. Although prostitution itself (i.e., the purchase and sale of sexual services) was not criminalized, almost all activities associated with it were prohibited, making it, in effect, impossible to engage in prostitution-related activities without committing a criminal offence. The SCC found the following offences unconstitutional:

- the bawdy house offence (section 210) in so far as it applied to a place that is kept, occupied or resorted to for the purposes of prostitution (as opposed to the practice of acts of indecency) because it prevented prostitutes from moving indoors, which the SCC found to be the safest way to sell sexual services;
- the living on the avails of prostitution offence (paragraph 212(1)(j)) because it prevented prostitutes from hiring bodyguards to protect them; and,
- the offence prohibiting communicating in public places for the purposes of purchasing or selling sexual services (paragraph 213(1)(c)) because it forced street prostitutes to forego screening potential clients.

For more information on *Bedford*, please see Annex 1: Justice Canada's Technical Paper on Bill C-36, which provides a detailed overview of the SCC's findings. The Technical Paper, which was prepared by Justice officials and tabled before both Parliamentary Committees that considered Bill C-36, explains the Bill's objectives and the scope of its offences and references the evidence that informed its development.

New legal framework: Bill C-36

Bill C-36, the *Protection of Communities and Exploited Persons Act*, which responds to the *Bedford* decision and came into force on December 6, 2014, treats prostitution as a form of sexual exploitation of primarily women and girls. It criminalizes the purchase of sexual services (section 286.1 of the *Criminal Code*), which offence makes prostitution illegal, receiving a material benefit from the prostitution of others (section 286.2) and advertising the sale of others'

sexual services (section 286.4), and modernizes other prostitution offences, such as procuring (section 286.3). It also criminalizes sellers of sexual services if they communicate for the purpose of selling in specific locations that are designed for the use of children, i.e., school grounds, playgrounds and daycare centres (subsection 213(1.1)). These new offences replaced the old offences struck down by the SCC; however, two offences (paragraphs 213(1)(a) and (b)), which pre-date Bill C-36 and were not at issue in *Bedford*, continue to apply. They prohibit stopping motor vehicles/impeding the free flow of pedestrian or vehicular traffic for the purpose of selling or purchasing sexual services.

Bill C-36 also contains some minor amendments to the human trafficking offences (sections 279.01 to 279.03) to ensure a consistent approach to both prostitution and human trafficking for sexual exploitation, which Bill C-36 treats as related criminal conduct. Notably, in trafficking for sexual exploitation cases, both trafficking in persons and prostitution charges are frequently laid, among others. Bill C-36 complements recent federal efforts to address human trafficking, for example, through the 2012 National Plan of Action to Combat Trafficking in Persons.

Prostitution in Canada: what we know

Although it is difficult to estimate the extent of prostitution activities in Canada, due largely to its clandestine nature, research has shown that the majority of those who sell their own sexual services in Canada are women and girls, a significant proportion of whom started doing so before adulthood. Canadian studies have also noted the disproportionate number of Aboriginal women and girls involved in prostitution. This group experiences higher rates of violence, poverty, substance abuse, and family breakdown, making them particularly vulnerable to victimization. For more information, please see Justice Canada's Technical Paper (Annex 1).

Complementary Funding

To complement Bill C-36's reforms, the government dedicated \$20M in new funding to support a range of social programming for those who wish to leave prostitution. This dedicated funding has been allocated through existing Justice Canada and Public Safety Canada funds to various non-governmental organizations, many of which supported Bill C-36's overall approach, as well as to certain police forces. For example, to date, 12 NGO proposals and 10 police service proposals have been funded through Justice Canada's Victims of Crime fund.

CONSIDERATIONS

Prostitution and the legal responses to it remain a divisive and controversial issue both within Canada and internationally. Some view prostitution as legitimate work, which should be

decriminalized and regulated (i.e., supporters of decriminalization or legalization), while others view it as a form of sexual exploitation which must be ended (i.e., supporters of abolition).

Both internationally and domestically, the debate generally centres on whether decriminalization or abolition is the appropriate legal response:

- **Decriminalization:** involves the repeal of prostitution-related criminal law, leaving in place criminal laws of general application and other laws to deal with the industry. While some minimum level of prostitution-specific regulations may be implemented, the objective is to treat prostitution like any other occupation and thereby reduce the risks and harm associated with it (implemented in New Zealand and some Australian states, e.g., Australian Capital Territory).
- **Abolition ("Nordic Model"):** involves criminalizing those who exploit sellers of sexual services (clients and third parties) and decriminalizing the sellers themselves, who are viewed as victims and assisted through new funded programs. This approach seeks to reduce the demand for sexual services, which is viewed as directly linked to human trafficking for the purposes of sexual exploitation (implemented in Sweden in 1999, Norway and Iceland in 2009, and Canada in 2014).

Consistent with the ongoing international debate, Bill C-36, often referred to as Canada's version of the "Nordic Model," was hotly debated in Parliament. Stakeholders who support decriminalization vehemently opposed it and stakeholders who support abolition advocated amending it to ensure that sellers of sexual services are not criminalized. Bill C-36 continues to be the subject of heated debate; some advocate its repeal while others advocate amendments to effect a true "Nordic Model" (i.e., repeal of section 213). The only point of agreement is that more resources are required to support sellers of their own sexual services.

CONCLUSION

Bill C-36, often referred to as Canada's "Nordic Model", continues to engender heated debate between those who support decriminalization and those who support abolition (i.e., the "Nordic Model").

ANNEXES [2]

Annex 1: Justice Canada's Technical Paper on Bill C-36

Annex 2: [REDACTED]

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TECHNICAL PAPER

**Bill C-36, An Act to amend the Criminal Code in response to the Supreme
Court of Canada decision in Attorney General of Canada v. Bedford
and to make consequential amendments to other Acts**

(Protection of Communities and Exploited Persons Act)

Department of Justice Canada

2014



Department of Justice
Canada

Ministère de la Justice
Canada

Canada

**Technical Paper: Bill C-36, *Protection of Communities and Exploited Persons Act*
July 2014**

This paper provides an overview of the Supreme Court of Canada's findings in its December 20, 2013 *Bedford* decision and explains the basis for the Government's legislative response: Bill C-36, the *Protection of Communities and Exploited Persons Act*.

I: *Bedford v. Attorney General of Canada*¹

In *Bedford*, the Supreme Court of Canada declared unconstitutional three *Criminal Code* offences addressing prostitution-related conduct on the basis that they violated section 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). Section 7 protects the rights to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The offences at issue were:

- prohibition on keeping or being in a "bawdy house" for purposes of prostitution (section 210);
- prohibition on living on the avails of prostitution (paragraph 212(1)(j)); and,
- prohibition on communicating in public for purposes of prostitution (paragraph 213(1)(c)).

The Court suspended the declaration of invalidity for 12 months "considering all the interests at stake" and recognizing that "how prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated."² The declaration of invalidity will take effect on December 20, 2014, at which point most adult prostitution-related activities would be decriminalized in Canada unless Parliament enacts new legislation before then.

Application of section 7 analysis to the offences at issue in Bedford

The Court found that the three offences sufficiently contributed to increasing the risks of harm experienced by prostitutes such that the offences infringed their right to security of the person. The Court affirmed the application judge's holding that the evidence showed that the offences prevented people "engaged in a risky — but legal — activity from taking steps to protect themselves from the risks".³

The Court went on to find that the legislative objectives of the bawdy house and communicating offences, which were primarily aimed at addressing public nuisance and community harms associated with prostitution, were far outweighed by the negative impacts of these offences on prostitutes' safety and security. The Court also concluded that the living on the avails offence went further than it needed to in order to address its legislative objective of preventing the exploitation of prostitutes and was, therefore, overbroad. The offences were therefore contrary to the principles of fundamental justice. More specifically, the Court found:

- The bawdy house offence (section 210) was **grossly disproportionate** in its serious impact on prostitutes' safety, since it prohibited "moving indoors" as a basic safety precaution. The heightened risks for prostitutes were not outweighed by the provision's

objective, which the Court characterized as nuisance-related, namely “to combat neighborhood disruption or disorder and to safeguard public health and safety”.⁴

- The living on the avails offence (paragraph 212(1)(j)) was **overbroad** in scope relative to its objective, which is to “target pimps and the parasitic, exploitative conduct in which they engage”, because it punished everyone who “lives on the avails” of prostitution without distinguishing between those who exploit prostitutes and those who could increase their safety and security (e.g., bodyguards, managers, or drivers) or provide other legitimate business services to prostitutes (e.g., accountants and receptionists).⁵
- The communicating offence (paragraph 213(1)(c)) was **grossly disproportionate** in its impact on prostitutes’ safety relative to its objective, which the Supreme Court said was to “take prostitution off the streets and out of public view” in order to prevent the nuisance that street prostitution can cause. The provision’s negative impact on the lives and safety of street prostitutes (e.g., by depriving them of an ability to screen customers before getting into their car) was a grossly disproportionate response to the nuisances caused by street prostitution.⁶

Throughout its analysis, the Court emphasized that the offences were directed at addressing the public nuisances and community health and safety issues caused by street prostitution and brothels, as well as the “parasitic exploitation” of prostitutes by pimps. The Court specifically found that the prohibitions were not directed at deterring prostitution more generally.⁷

Finally, the Court said that the Government had not presented evidence to justify the section 7 violations as reasonable limits demonstrably justified in a free and democratic society under section 1 of the Charter. In particular, the Court found that there was no evidence to show that the provisions were minimally impairing of the section 7-protected rights at stake, or that the positive impacts of the criminal prohibitions on broader societal interests outweighed their serious negative impacts on prostitutes’ safety.

Other key points

The Court addressed only the challenged provisions, noting that the case was “not about whether prostitution should be legal or not. [It was] about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster.”⁸ The Court also indicated that Parliament is not “precluded from imposing limits on where and how prostitution may be conducted” and recognized that “the regulation of prostitution is a complex and delicate matter.”⁹

The Court held that it did not need to decide the section 2(b) (freedom of expression) challenge to section 213 of the *Criminal Code*, previously upheld as constitutional by the Supreme Court of Canada in the 1990 *Prostitution Reference*,¹⁰ given the findings in respect of section 7.

II: Response to *Bedford*: Bill C-36

The Supreme Court of Canada gave Parliament one year to respond to its findings in *Bedford*. Failing to respond legislatively would result in decriminalization of most adult prostitution-related activities. Bill C-36 was introduced on June 4, 2014 in response to the *Bedford* decision.

Its overall objective is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible.

Bill C-36 was informed by the evidence before the courts in *Bedford*, as well as the decision itself, the public consultations conducted by the Government in February and March of 2014, jurisprudence interpreting existing prostitution-related *Criminal Code* offences, the available research on prostitution in Canada, including relevant Canadian Parliamentary reports, as well as available international research on prostitution, including relevant government reports from other jurisdictions. A summary of the Government's public consultation is attached at Annex A, a bibliography of the research that informed the development of Bill C-36 is attached at Annex B and the News Release and Backgrounder that accompanied Bill C-36's tabling are attached at Annex C.

a) Objectives of the Legislation

Bill C-36 reflects a significant paradigm shift away from the treatment of prostitution as "nuisance", as found by the Supreme Court of Canada in *Bedford*, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls. Bill C-36 signals this transformational shift both through its statement of purpose, as reflected in its preamble, and its placement of most prostitution offences in Part VIII of the *Criminal Code*, Offences Against the Person.¹¹

Bill C-36's objectives are based on the following conclusions drawn from the research that informed its development:

- The majority of those who sell their own sexual services are women and girls.¹² Marginalized groups, such as Aboriginal women and girls, are disproportionately represented.¹³
- Entry into prostitution and remaining in it are both influenced by a variety of socio-economic factors, such as poverty, youth, lack of education, child sexual abuse and other forms of child abuse, and drug addiction.¹⁴
- Prostitution is an extremely dangerous activity that poses a risk of violence and psychological harm to those subjected to it,¹⁵ regardless of the venue or legal framework in which it takes place,¹⁶ both from purchasers of sexual services and from third parties.¹⁷
- Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women's bodies as commodities to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.¹⁸
- Prostitution also negatively impacts the communities in which it takes place through a number of factors, including: related criminality, such as human trafficking and drug-related crime; exposure of children to the sale of sex as a commodity and the risk of being drawn into a life of exploitation; harassment of residents; noise; impeding traffic; unsanitary acts, including leaving behind dangerous refuse such as used condoms or drug paraphernalia; and, unwelcome solicitation of children by purchasers.¹⁹

- The purchase of sexual services creates the demand for prostitution, which maintains and furthers pre-existing power imbalances, and ensures that vulnerable persons remain subjected to it.²⁰
- Third parties promote and capitalize on this demand by facilitating the prostitution of others for their own gain. Such persons may initially pose as benevolent helpers, providers of assistance and protection to those who "work" for them.²¹ But the development of economic interests in the prostitution of others creates an incentive for exploitative conduct in order to maximize profits. Commercial enterprises in which prostitution takes place also raise these concerns and create opportunities for human trafficking for sexual exploitation to flourish.²²

Consequently, Bill C-36 recognizes that prostitution's victims are manifold; individuals who sell their own sexual services are prostitution's primary victims, but communities, in particular children who are exposed to prostitution, are also victims, as well as society itself. Bill C-36 also recognizes that those who create the demand for prostitution, i.e., purchasers of sexual services, and those who capitalize on that demand, i.e., third parties who economically benefit from the sale of those services, both cause and perpetuate prostitution's harms.

Accordingly, Bill C-36 seeks to denounce and prohibit the demand for prostitution and to continue to denounce and prohibit the exploitation of the prostitution of others by third parties, the development of economic interests in the exploitation of the prostitution of others and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which prostitution takes place. It also seeks to encourage those who sell their own sexual services to report incidents of violence and leave prostitution. Bill C-36 maintains that the best way to avoid prostitution's harms is to bring an end to its practice.

b) Offences: Purchasers and Third Parties

Purchasing Offence

Bill C-36 proposes to criminalize, for the first time in Canadian criminal law, the purchase of sexual services. This new offence would make prostitution itself an illegal practice; every time prostitution takes place, regardless of venue, an offence would be committed. In criminalizing those who create the demand for prostitution, Bill C-36 furthers its overall objective to reduce that demand, with a view to ultimately abolishing prostitution to the greatest extent possible.

Bill C-36's new purchasing offence would prohibit obtaining sexual services for consideration, or communicating in any place for that purpose (section 286.1). This offence would impose maximum penalties of 5 years imprisonment where prosecuted by indictment and 18 months where prosecuted by summary conviction and escalating mandatory minimum fines. Purchasing sexual services from a person under the age of 18 would be an even more serious offence. Although already prohibited in existing criminal law,²³ Bill C-36 would move this offence to Part VIII of the *Criminal Code*, along with most other prostitution offences, and increase the maximum penalty from 5 to 10 years imprisonment and the applicable mandatory minimum penalty for a subsequent offence from 6 months to one year.

The purchasing offence is carefully tailored to its objective of reducing the demand for sexual services. It is based on the existing offence that prohibits obtaining sexual services for

consideration from persons under the age of 18 years and, accordingly, jurisprudence interpreting that offence assists in defining the scope of the new offence. Jurisprudence that interprets the meaning of "prostitution" is also instructive, given that "prostitution" is defined as the exchange of sexual services for payment.²⁴

To determine whether a particular act constitutes a "sexual service for consideration" or "prostitution", the court will consider whether the service is sexual in nature and whether the purpose of providing the service is to sexually gratify the person who receives it. Specifically, a contract or agreement, whether express or implied, for a specific sexual service in return for some form of consideration is required.²⁵ In particular, the consideration must be contingent on the provision of a particular sexual service and the contract or agreement must be entered into before the sexual service is provided.²⁶ Sexual activity involving no expectation of getting paid for the services provided does not meet the test.²⁷ Sexual activity in the context of ongoing relationships also fails to meet the test, unless the evidence shows that the alleged consideration was contingent on the provision of a particular sexual service.²⁸ In one case, gifts given to the complainant were not viewed as consideration for sexual favours rendered, but rather as gifts given "dans le cadre plus large de la relation affective entre l'accusé et le plaignant".²⁹ Another case held that the phrase "sexual services for consideration" is not intended to apply to consensual actions between those having an affinity towards one another.³⁰

The following activities have been found to constitute a sexual service or an act of prostitution, if provided in return for some form of consideration: lap-dancing, which involves sitting in the client's lap and simulating sexual intercourse;³¹ masturbation of a client in the context of a massage parlour, whether or not the client climaxes;³² and, sado-masochistic activities, provided that the acts can be considered to be sexually stimulating/gratifying.³³ However, jurisprudence is clear that neither acts related to the production of pornography,³⁴ nor stripping³⁵ meet the test. In most cases, physical contact, or sexual interaction, between the person providing the service and the person receiving it is required; however, acts for which consideration is provided that take place in a private room in a club and that are sexual in nature, but do not involve physical contact between the "client" and "performer", such as self-masturbation, have been found to constitute prostitution.³⁶

In short, whether a particular service meets the test outlined above is a factual determination to be made by a court. Applicable jurisprudence provides flexibility in addressing new ways of effecting prostitution, while also limiting the scope of such offences to acts related to prostitution, consistent with its objective of reducing demand for sexual services

Advertising Offence

To complement the purchasing offence, Bill C-36 proposes to criminalize, also for the first time in Canadian criminal law, advertising the sale of sexual services. This new offence targets the promotion of prostitution through advertisements, which contributes to the demand for prostitution. This approach is consistent with the legislation's overall objective of reducing the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible.

Bill C-36's new advertising offence would criminalize knowingly advertising an offer to provide sexual services for consideration (section 286.4). This offence would impose maximum

penalties of 5 years imprisonment where prosecuted by indictment and 18 months where prosecuted by summary conviction.

The advertising offence targets persons who place advertisements in print media or post advertisements on websites. Publishers or website administrators could be held criminally liable as parties if they know of the existence of the advertisement and that the advertisement is in fact for the sale of sexual services. Bill C-36 would also allow the court to order the seizure of materials containing advertisements for the sale of sexual services, as well as their removal from the Internet, regardless of who posted them, which is also consistent with Bill C-36's objective of reducing demand for prostitution.

Material Benefit Offence

Bill C-36 proposes a new material benefit offence that would modernize the existing living on the avails of prostitution offence, which was found unconstitutional in *Bedford*. Consistent with Bill C-36's objective of continuing to denounce and prohibit the development of economic interests in the exploitation of the prostitution of others, as well as the institutionalization and commercialization of prostitution, Bill C-36 would criminalize receiving a material benefit from the prostitution of others in exploitative circumstances, including from participation in business activities involving prostitution from which third parties profit.

Specifically, the new material benefit offence would criminalize receiving a financial or other material benefit obtained by or derived from the commission of the purchasing offence (section 286.2). Where the victim is an adult, the maximum penalty would be 10 years imprisonment; where the victim is a child, the maximum penalty would be 14 years imprisonment and the mandatory minimum penalty would be 2 years.

Bill C-36 would not prevent those who sell their own sexual services from entering into legitimate family and business relationships on the same basis as anyone else. In this regard, Bill C-36 would narrow the scope of the material benefit offence through legislated exceptions, which clarify that the offence does not apply if the benefit is received:

- in the context of a legitimate living arrangement, for example by a spouse, child or roommate of the person who provides the benefit;
- as a result of a legal or moral obligation, for example by a dependent parent of the person who provides the benefit or where a gift is purchased with the earnings of prostitution;
- in consideration for goods or services offered on the same terms and conditions to the general public, such as by an accountant, landlord, pharmacist or security company; and
- in consideration for a good or service that is offered informally, for example by a person who provides protective or administrative services, provided that the benefit received is proportionate to the value of the good or service provided and the person who provided the service did not encourage, counsel or incite the provision of sexual services.

None of these exceptions would be applicable, however, if the person who received the material benefit from the prostitution of others:

- used or threatened to use violence, intimidation or coercion toward the person who provided the benefit;
- abused a position of trust, power or authority toward the person who provided the benefit;

- provided intoxicating substances to the person who provided the benefit to aid or abet that person's prostitution;
- engaged in conduct that would constitute procuring under the new procuring offence; or,
- received the benefit in the context of a commercial enterprise that offers sexual services for sale, such as a strip club, massage parlour or escort agency in which prostitution takes place.

These proposed exceptions reflect existing jurisprudence that carves out exceptions to the current living on the avails of prostitution offence. The "legitimate living arrangement" and "legal and moral obligation" exceptions find their origin in the Ontario Court of Appeal's 1991 *Grilo* decision,³⁷ which was cited as an authority on these issues by the Supreme Court of Canada in *Bedford*. The exception related to goods and services offered to the general public originates in a line of cases starting with the 1962 House of Lords decision in *Shaw*.³⁸ The fourth exception for services or goods provided for proportionate value responds to the Supreme Court of Canada's *Bedford* decision by exempting non-exploitative relationships.³⁹ Also, Bill C-36 would provide an extra layer of protection in cases involving persons who initially pose as a benevolent helper and thereby appear to be entitled to one of the exceptions; it would remove the availability of any of the exceptions if any exploitative circumstances materialize.

Although "commercial enterprise" is not defined, the phrase has been interpreted in sentencing cases under the *Controlled Drugs and Substances Act*.⁴⁰ Courts apply a contextual analysis to determine whether a particular enterprise is commercial in nature,⁴¹ which provides flexibility to the courts to find different types of enterprises, including informal ones, to be "commercial". In the context of Bill C-36, a "commercial enterprise" would necessarily involve third party profiteering. Courts would likely take into account considerations such as the number of persons involved, the duration of the activities and the level of organization surrounding the activities. The only type of enterprise that this phrase could not capture is one involving individuals who sell their own sexual services, whether independently or cooperatively, from a particular location or from different locations. Bill C-36 would not allow for prosecution in these circumstances for reasons outlined in the section below. Otherwise, Bill C-36 would provide flexibility to the courts to find different types of enterprises, including informal ones, to be "commercial" in nature.

Bill C-36 also proposes to reformulate the existing presumption that applies to the living on the avails offence (subsection 212(3)), which allows a prosecutor to prove an element of the offence by introducing evidence that the accused lived with or was habitually in the company of a prostitute. Similarly, Bill C-36's proposed subsection 286.2(3) would allow a prosecutor to prove that an accused received a financial or material benefit from the sexual services of another by introducing evidence that the accused lived with or was habitually in the company of a person who offers or provides sexual services for consideration. The application of this presumption would take into account the scope of the material benefit offence as narrowed by the exceptions.

In its 1992 *Downey* decision, the Supreme Court of Canada found that the existing subsection 212(3) presumption infringed the presumption of innocence as protected by section 11(d) of the *Charter*, but was justified as a reasonable limit under section 1. Specifically, the Court found that those who sell their own sexual services are often reluctant to testify against their "pimps", who "maintain control by the emotional dependence of prostitutes upon them or

by physical violence” and that this problem is not unique to Canada, thereby justifying the enactment of a rebuttable evidentiary presumption.⁴²

Procuring Offence

Bill C-36 proposes to modernize the procuring offences in existing subsection 212(1), which uses antiquated language and creates significant overlap between offences by criminalizing similar conduct effected in different ways. Consistent with Bill C-36's objective of continuing to denounce and prohibit the procurement of persons for the purpose of prostitution, Bill C-36 prohibits comprehensively all conduct related to procuring others for the purpose of prostitution.

Specifically, the procuring offence would criminalize procuring a person to offer or provide sexual services for consideration or recruiting, holding, concealing or harbouring a person who offers or provides sexual services for consideration, or exercising control, direction or influence over the movements of that person, for the purpose of facilitating the purchasing offence (section 286.3). Where the victim is an adult, the maximum penalty would be 14 years imprisonment; where the victim is a child, the maximum penalty would be 14 years imprisonment and the mandatory minimum penalty would be 5 years.

Bill C-36's procuring offence could be proven in one of two ways. First, the offence could be proven if the accused “procured” another person for the purposes of prostitution. The term “procure” has been interpreted by the Supreme Court of Canada as meaning “to cause, induce or have persuasive effect,”⁴³ which necessarily entails active involvement in the prostitution of another on the part of the accused. Second, the offence could be proven if the accused recruited, held, concealed or harboured a person for the purposes of prostitution or exercised control, direction or influence over the movements of a person for that purpose. This approach builds on existing jurisprudence interpreting one of the existing procuring offences⁴⁴ and the human trafficking offence,⁴⁵ both of which use some of the same language as found in new section 286.3.

The difference between the material benefit and the procuring offences hinges on the level of involvement in the prostitution of other persons. As with existing procuring offences, the new procuring offence would require active involvement in the provision of another person's sexual services; whereas, passive involvement would be sufficient to make out the material benefit offence. For example, a “classic pimp” would likely be caught by both the procuring offence and the material benefit offence, because pimps generally induce or cause others to offer or provide their sexual services and they economically benefit from that activity. In contrast, a person who derives a benefit from the prostitution of others, without actively inciting the provision of sexual services, such as a “bouncer,” who works at a strip club and knows that prostitution takes place there, would only be caught by the material benefit offence.⁴⁶ This difference justifies the imposition of higher penalties for procuring.

c) Immunities: Sellers

Bill C-36 proposes to criminalize the purchase but not the sale of sexual services. However, Bill C-36 would in no way condone the sale of sexual services; rather, it would treat those who sell their own sexual services as victims who need support and assistance, rather than blame and punishment. Research shows that individuals frequently engage in prostitution as a result of seriously constrained choices and/or because they have been coerced by unscrupulous

individuals to do so.⁴⁷ This asymmetrical approach is also intended to encourage those who sell their own sexual services to report incidents of violence and exploitation committed against them, rather than seeking to avoid detection by law enforcement.

Accordingly, Bill C-36 would expressly immunize from prosecution individuals who receive a material benefit from their own sexual services or who advertise those services. It would also immunize those who sell their own sexual services for any part they may play in the purchasing, material benefit, procuring or advertising offences in relation to the sale of their own sexual services. Such prosecutions would otherwise normally be available by operation of general provisions of the criminal law that impose criminal liability on persons for various forms of participation in offences committed by other persons (i.e., liability for aiding, abetting or counseling another to commit an offence, conspiring with another person to commit an offence or being an accessory after the fact to an offence). These immunities would mean that individuals could not be prosecuted for selling their own sexual services, whether independently or cooperatively, from fixed indoor or other locations, as long as the only benefit received is derived from the sale of their own sexual services.

d) Offences: Community Harms

Bill C-36 proposes to protect communities, and especially children, from prostitution's harms by imposing higher mandatory minimum fines on those who purchase sexual services or communicate for that purpose in specified locations, i.e., parks, schools, religious institutions and places where children could reasonably be expected to be present. In this way, Bill C-36 is intended to send a particularly strong message to purchasers about the harms their conduct causes to vulnerable communities in its effort to reduce the demand for prostitution.

Bill C-36 would also achieve its goal of protecting communities by criminalizing communicating for the purposes of selling sexual services in public places where children could be exposed to this conduct. In this regard, Bill C-36's objective is to protect children from exposure to prostitution, which is viewed as a harm in and of itself, because such exposure risks normalizing a gendered and exploitative practice in the eyes of impressionable youth and could result in vulnerable children being drawn into a life of exploitation. In not criminalizing public communications for the purposes of selling sexual services except in these narrow circumstances, Bill C-36 recognizes the different interests at play, which include the need to protect from violence those who sell their own sexual services, as well as the need to protect vulnerable children from prostitution's harms.

Specifically, Bill C-36 would criminalize communicating for the purposes of selling sexual services in a public place, or in any place open to public view, that is or is next to a place where persons under the age of 18 can reasonably be expected to be present (subsection 213(1.1)). This would be a summary conviction offence with a maximum penalty of 6 months imprisonment.

"Where children can reasonably be expected to be present" is a standard that has meaning in criminal law. It is used in the provision that authorizes courts to impose prohibition orders on child sexual offenders⁴⁸ and in the provision that authorizes the imposition of peace bonds on suspected child sexual offenders.⁴⁹ Courts apply a qualified objective test,⁵⁰ which requires the adjudicator to determine whether a person in the position of the accused would reasonably know that the location, at the time in question, amounted to a place where children could reasonably be

expected to be present. In short, whether a particular location, at the time an offence is committed, constitutes a "place where children can reasonably be expected to be present" is a factual determination to be made by a court. This approach would provide courts with discretion to apply the test reasonably in different contexts.

New subsection 213(1.1) targets communications for the purpose of selling sexual services in physical (or "real world") public places, such as the street. Nonetheless, the offence could capture communications between two or more persons that take place in virtual locations that are publicly accessible, such as on social networking sites like Facebook, if two people communicate with each other for the purposes of exchanging sexual services for consideration on such a site and it is determined that children could reasonably be expected to view that communication. However, subsection 213(1.1) would not criminalize advertisements for the sale of sexual services because such advertisements do not involve direct communication between two people for the proscribed purpose. The proposed advertising offence (section 286.4), on the other hand, targets advertisements for the sale of sexual services.

Bill C-36 would also retain, but modernize, existing paragraphs 213(1)(a) and (b), which were not at issue in the *Bedford* case. These offences criminalize stopping or attempting to stop motor vehicles or impeding the free flow of pedestrian or vehicular traffic in public places or places open to public view for the purpose of either purchasing or selling sexual services. These are summary conviction offences with maximum penalties of 6 months imprisonment. Their objective is to protect residents of communities in which prostitution takes place from harassment by both those who purchase and those who sell sexual services.

e) Safety Issues

First and foremost, Bill C-36 seeks to ensure the safety of all by reducing the demand for prostitution, with a view to deterring it and ultimately abolishing it to the greatest extent possible. However, Bill C-36 recognizes that its proposed transformational paradigm shift would take time to realize; changing social attitudes can be a long process. Bill C-36's proposed approach, therefore, acknowledges that some would remain at risk of, or subjected to, exploitation through prostitution, while this proposed transformation occurs.

In response to this concern, Bill C-36 would focus law enforcement attention primarily on individuals who purchase sexual services, as well as on third parties who exploit individuals that sell sexual services. In addition, Bill C-36 would not prohibit individuals from taking certain measures to protect themselves when selling their own sexual services. In *Bedford*, the Supreme Court of Canada found that existing *Criminal Code* offences prevented sellers of sexual services from taking certain safety measures when engaging in a risky, but legal activity. These protective measures are: selling sexual services from fixed indoor locations, hiring persons who may serve to enhance safety and negotiating safer conditions for the sale of sexual services in public places. Bill C-36 seeks to balance these concerns with other broader safety and societal concerns posed by prostitution more generally: the need to protect those subjected to prostitution from violence and exploitation; the need to protect communities from prostitution's harmful effects, including exposure of children; and, the need to protect society itself from the normalization of a gendered and exploitative practice. In addressing this complex interplay of

issues related to safety, the Supreme Court of Canada's concluding comments in its *Bedford* decision were instructive:

I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure -- for example, permitting prostitutes to obtain the assistance of security personnel -- might impact on the constitutionality of another measure -- for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.⁵¹

Bill C-36 addresses the Supreme Court of Canada's safety concerns in the larger context of all the harms, risks and dangers posed by prostitution in the following way:

Fixed Indoor Locations: The Supreme Court of Canada expressed concern that the existing prostitution offences prevent the selling of sexual services from fixed indoor locations, which the Court found to be a safer place to sell sex. Under Bill C-36, individuals could not be prosecuted for selling their own sexual services, including from a fixed indoor location, whether independently or cooperatively.

Bodyguards and Drivers: The Supreme Court of Canada's second major concern was that existing offences prevent those who sell sexual services from hiring bodyguards and others who may enhance their safety. Bill C-36 carefully balances this safety concern with the need to ensure that exploitative third parties are criminalized. It would achieve this goal by: criminalizing receiving a financial or other material benefit that is obtained by or derived from the purchasing offence; limiting the scope of the offence through legislated exceptions, including exceptions that would apply to individuals who offer protective services; and, ensuring that none of the exceptions apply in exploitative circumstances.

Negotiating in Public Places: The Supreme Court of Canada's final concern was that individuals who sell their own sexual services should not be prevented from taking steps to negotiate safer conditions for the sale of sexual services in public places. Existing laws criminalize all public communications for the purpose of either purchasing or selling sexual services. Bill C-36, on the other hand, proposes, first, a new offence that would criminalize communicating *in any place* for the purpose of purchasing sexual services and, second, a separate offence that would criminalize communicating for the purpose of selling sexual services, but only *in public places where children could reasonably be expected to be present*. This approach strikes a careful balance between the interests of two vulnerable groups: those who are subjected to prostitution and children who may be exposed to it. Notably, Bill C-36 would not prohibit persons who sell their own sexual services from communicating for that purpose in any public place, other than where children could reasonably be expected to be harmed by exposure to prostitution.⁵²

III: International Context

Canada is not alone in proposing a legislative approach to prostitution that views the practice as a form of sexual exploitation by targeting those who create the demand for it and those who capitalize on that demand. Sweden was the first country to implement such an approach in 1999, followed by Norway and Iceland in 2009, which is why Sweden's approach is referred to as the "Nordic Model". Furthermore, France's Senate is currently considering a bill that would implement the Nordic Model,⁵³ the Northern Ireland Committee for Justice voted in favour of a bill that would criminalize paying for another person's sexual services in April 2014,⁵⁴ Ireland's Joint Committee on Justice, Defence and Equality recommended the Nordic Model in June 2013⁵⁵ and a March 2014 United Kingdom All-Party Parliamentary Report recommended implementation of a version of that approach.⁵⁶

Moreover, the European Parliament endorsed the Nordic Model in February 2014⁵⁷ and, in April 2014, the Council of Europe recommended that member and observer states, which includes Canada, consider criminalizing the purchase of sexual services, as the most effective tool for preventing and combating human trafficking, and banning advertising sexual services and pimping.⁵⁸ The United Nations Committee on the Elimination of Discrimination against Women has also recommended or welcomed the criminalization of the purchase of sexual services and has stressed the importance of addressing the demand for prostitution.⁵⁹ In short, this approach is receiving growing international support as a sound policy approach, supported by an expanding body of evidence.

In 2008, the Swedish government appointed the Committee of Inquiry to Evaluate the Ban against the Purchase of Sexual Services, headed by Chancellor of Justice Anna Skarhed, a former Justice of the Supreme Court, to assess the ban against the purchase of sexual services from 1999 to 2008.⁶⁰ The Committee of Inquiry concluded that the Nordic Model was successful in deterring purchasers of sexual services, decreasing the number of prostituted persons and clients, and gaining favorable public support.⁶¹ These conclusions were supported by other sources as well.⁶² Furthermore, the Swedish Government has seen no concrete evidence that prostitution has merely been displaced and not reduced, e.g., moved from outdoor to other arenas, such as indoor locations, since implementation of the Nordic Model,⁶³ and evidence suggests that the criminalization of the purchase of sexual services has helped to combat prostitution and human trafficking for sexual purposes.⁶⁴

Since its implementation, some have raised concerns that the Nordic Model would drive prostitution underground, make human trafficking more difficult to detect and impact the safety and well-being of vulnerable women. Although some studies, mostly qualitative, have been conducted on these issues,⁶⁵ there is no concrete empirical evidence available to support the assertion that prostitution, which is already an underground activity given its nature and the prevalence of criminal elements even in decriminalized/legalized regimes, has been pushed further underground through the criminalization of purchasers.

On the other hand, research on the experience of countries such as Australia, Germany and the Netherlands shows that jurisdictions that have decriminalized or legalized prostitution tend to have larger sex industries than those that have not decriminalized or legalized prostitution.⁶⁶

Jurisdictions that have decriminalized or legalized prostitution have also experienced an expansion of their overall sex industries post-legalization/decriminalization,⁶⁷ especially outside the legal zones or regulated environments,⁶⁸ and individuals who sell their own sexual services continue to be vulnerable to violence and exploitation at the hands of third parties. Research indicates that coerced prostitution and human trafficking have flourished in both legal and illegal sectors,⁶⁹ and that social stigmatization of individuals who sell their own sexual services continues to prevail, while their overall "material conditions have not noticeably improved".⁷⁰ Finally, two recent empirical studies have shown that decriminalization and legalization are linked to higher rates of human trafficking for sexual exploitation.⁷¹

Endnotes

- ¹ *Bedford v Attorney General of Canada*, [2013] SCJ No.72.
- ² *Ibid* at paras 167-69.
- ³ *Ibid* at paras 60-92.
- ⁴ *Ibid* at paras 132-136.
- ⁵ *Ibid* at para 142.
- ⁶ *Ibid* at paras 158-59.
- ⁷ *Ibid* at paras 132-147.
- ⁸ *Ibid* at para 2.
- ⁹ *Ibid* at para 165.
- ¹⁰ *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123.
- ¹¹ By contrast, existing prostitution offences are all placed in Part VII, Disorderly Houses, Gaming and Betting.
- ¹² Quebec, Conseil du Statut de la femme du Québec, *La prostitution: il est temps d'agir* (2012) at 28, online: http://www.csn.qc.ca/c/document_library/get_file?uuid=9dfcb4ff-d60d-4c42-af9e-dfabadd202d5&groupId=2464358. See Canada, Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*, (Ottawa: Standing Committee on Justice and Human Rights, 2006) at 10, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2599932&Language=E&Mode=1&Parl=39&Ses=1>.
- ¹³ Conseil du Statut de la femme du Québec, *supra* note 12 at 47-8. See Canada, Subcommittee on Solicitation Laws, *supra* note 12 at 12-3. See Melissa Farley et al., "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder" (2004) 2:3-4 *Journal of Trauma Practice* 33 at 37-8, online: <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>.
- ¹⁴ Canada, Subcommittee on Solicitation Laws, *supra* note 12 at 11-12. See Melissa Farley et al., *supra* note 13 at 48-9 and 65. See Conseil du Statut de la femme du Québec, *supra* note 12 at 29.
- ¹⁵ Conseil du Statut de la femme du Québec, *supra* note 12 at 52-55. See Melissa Farley et al., *supra* note 13. See Canada, Subcommittee on Solicitation Laws, *The Challenge of Change*, *supra* note 12 at 19-21. See Richard Poulin, "Prostitution et traite des êtres humains: controverses et enjeux" (2008) 45 *Cahiers de recherche sociologique* 135 at 4-5, online: <http://sisvphc.org/IMG/pdf/Prosti.traitéPoulin.pdf>. See Maddy Coy, *Prostitution, Harm and Gender Inequality: Theory, Research and Policy* (Burlington, VT: Ashgate, 2012). See Maddy Coy, Josephine Wakeling & Maria Garner, "Selling sex sells: Representations of prostitution and the sex industry in sexualised popular culture as symbolic violence" (2011) 34 *Women's Studies International Forum* 441 at 443.
- ¹⁶ Liz Kelly, Maddy Coy & Rebecca Davenport, "Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries" (Child & Women Abuse Studies Unit, London Metropolitan University, 2009) at 40-3, online: http://www.turnofftheredlight.ie/wp-content/uploads/2011/02/Shifting_Sands_UK-HOMe-Office.pdf. See Melissa Farley, "Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized" (2004) 10:10 *Violence Against Women* 1087, online: <http://projectrespect.org.au/system/files/Prostitution+Harms+Women.pdf>. See NZ, Prostitution Law Review Committee, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, (New Zealand: Ministry of Justice, 2008), online: <http://www.justice.govt.nz/policy-commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>. See NZ, *Prostitution Law Reform in New Zealand*, Parliamentary Library Research Paper (NZ: Parliamentary Library, 2012), online: <http://www.parliament.nz/en-nz/parl-supportresearch-papers/00PLSocRP12051-prostitution-law-reform-in-new-zealand>. See Melissa Farley, *Prostitution and Trafficking in Nevada: Making the Connections* (San Francisco: Prostitution Research and Education, 2007). See Jess N. Gibly, "Safe Sex for Sale: Is Legalizing Sex Work the Answer to Sex Trafficking in the Netherlands?" (2012) 4:1 *International Journal of Undergraduate Research and Creative Activities* at 1-11, online: <http://commons.pacificu.edu/cgi/viewcontent.cgi?article=1004&context=ijurca>. See Richard Poulin, "The legalization of prostitution and its impact on trafficking in women and children" (2005), online: http://sisvphc.org/article.php3?id_article=1596.
- ¹⁷ Conseil du Statut de la femme du Québec, *supra* note 12 at 34-42. See Canada, Subcommittee on Solicitation Laws, *The Challenge of Change*, *supra* note 12 at 17. See M. Dank et al. "Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities" (2014) *The Urban Institute*, online: <http://www.urban.org/UploadedPDF/413047-Underground-Commercial-Sex-Economy.pdf>.

- ³² *R v Ni*, [2002] 158 OAC 230, 53 WCB (2d) 485 (Ont. CA). See *R v Brandes*, [1997] OJ No.5443 (Ont. CJ (Prov. Div.)).
- ³³ *R v Bedford* [2000] 143 CCC (3d) 311, 184 DLR (4th) 727 (Ont. CA), leave to appeal to S.C.C. refused 147 CCC (3d) vi, 193 DLR (4th) vii. See *R v Wahl*, [1999] JQ no.2540 (Cour municipale de Montreal).
- ³⁴ *R v Bauer*, [1999] OJ No. 5294 (Ont. CJ). See *R v Natarajan*, [1995] 177 AR 190, 29 WCB. (2d) 379 (Alta. Prov. Ct.).
- ³⁵ *R v Safu*, [2002] OJ No.3046 (Ont. CJ). See *Bauer*, *supra* note 34.
- ³⁶ *R v St-Onge*, [2001] 155 CCC (3d) 517, 44 CR (5th) 395; 50 WCB (2d) 485 (QCA.). See *R v Tremblay*, [1991] 41 QAC 241, 68 CCC (3d) 439, 14 WCB (2d) 490 (QCA).
- ³⁷ *R v Grilo*, [1991] 2 O.R. (3d) 514 (Ont. C. A.), cited in *Bedford*, *supra* note 1 at para 141.
- ³⁸ *Shaw v Director of Public Prosecutions*, [1962] AC 220 (H.L.), cited in *Bedford*, *supra* note 1 at para 141.
- ³⁹ *Bedford*, *supra* note 1 at para 142.
- ⁴⁰ Jurisprudence shows that courts will consider drug offences committed in the context of a "commercial enterprise" as an aggravating factor for the purpose of sentencing under the *Controlled Drugs and Substances Act*.
- ⁴¹ *R v Gobran*, [2013] 308 OAC 12 (OCA).
- ⁴² *R v Downey*, [1992] SCJ No. 48 at para 46.
- ⁴³ *R v Deutsch*, [1986] SCJ No. 44 at para 32.
- ⁴⁴ See subsection 212(1)(h) of the *Criminal Code*, which prohibits, for the purposes of gain, exercising control, direction or influence over the movements of a person in such a manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally. See *R v Perrault*, [1997] RJQ 4 (QCA) interprets the meaning of "exercises control, direction or influence over the movements of...".
- ⁴⁵ See section 279.01 of the *Criminal Code*, which prohibits recruiting, transporting, transferring, receiving, holding, concealing or harbouring a person or exercising control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation. "Exploitation" is defined in section 279.04. These provisions were enacted in 2005. There is some jurisprudence interpreting the offence, for example: *R c Urizar*, [2013] JQ no. 132 (QCA) and *R v Beckford and Stone*, [2013] OJ No. 371 (Ont. SCJ), in which the constitutionality of section 279.011 (trafficking in children) was upheld. Section 279.011 is identical to section 279.01, with the exception that it imposes mandatory minimum penalties for trafficking children.
- ⁴⁶ A person who receives a material benefit in the context of a commercial enterprise that offers sexual services for consideration would not be entitled to any of the legislated exceptions to the material benefit offence, including the exception that applies to persons who offer protective services, by virtue of paragraph 286.2(5)(e). This approach is consistent with Bill C-36's objective of prohibiting the commercialization and institutionalization of prostitution.
- ⁴⁷ See research referenced at notes 14, 21 and 22.
- ⁴⁸ See section 161 of the *Criminal Code*.
- ⁴⁹ See section 810.1 of the *Criminal Code*.
- ⁵⁰ *R. v. Perron*, [2009] O.J. No. 2534.
- ⁵¹ *Bedford*, *supra* note 1 at para 165.
- ⁵² Where such activity is found to be harmful to children but occurs in private places, such as in the child's home, other *Criminal Code* offences, such as corrupting children (section 172), may apply. Provincial/territorial child welfare legislation also allows for state intervention where a child is in need of protection.
- ⁵³ Assemblée nationale de France. No. 1437: *Proposition de loi renforçant la lutte contre le système prostitutionnel*, Quatorzième Législature, 2013, online : http://www.assemblee-nationale.fr/14/propositions_pion1437.asp
- ⁵⁴ NIA Bill 26/11-15, *Human Trafficking and Exploitation Bill*, 2011-2015 sess. 2013, online: <http://www.niassembly.gov.uk/Assembly-Business-Legislation/Current-Non-Executive-Bill-Proposals-Human-Trafficking-and-Exploitation-Further-Provisions-and-Support-for-Victims-Bill/>
- See Northern Ireland, Committee for Justice, *Report on the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill* (NIA 26/11-15), NIA 170/11-15, 10 April 2014, online: <http://archive.niassembly.gov.uk/justice/report-human-trafficking/Report-on-Human-Trafficking-Bill.pdf>
- ⁵⁵ Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality, *Report on hearings and submissions on the Review of Legislation on Prostitution*, June 2013, online: <http://www.oireachtas.ie/parliament/media/committees/justice/1.Part-1-final.pdf>
- ⁵⁶ United Kingdom, All-Party Parliamentary Group on Prostitution and the Global Sex Trade, *Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales*, March 2014, online: <http://prostitutionresearch.com/2014-04-29-shifting-the-burden-inquiry-to-assess-the-operation-of-the-current-legal-settlement-on-prostitution-in-england-and-wales/>

⁵⁷ European Parliament, *Resolution on sexual exploitation and prostitution and its impact on gender equality*, Adopted (26 February 2014), online: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMIM_ET\(2014\)493040_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMIM_ET(2014)493040_EN.pdf). This resolution indicates that the European Parliament: endorsed the Nordic Model as one way of combating the trafficking of women and under-age females for sexual exploitation; recognized that prostitution and forced prostitution are intrinsically linked to gender inequality and have an impact on the status of women and men in society and the perception of their mutual relations and sexuality, that prostitution forced prostitution and sexual exploitation are highly gendered issues and violations of human dignity, that prostitution can have devastating and long-lasting psychological and physical consequences for the individual involved, especially children and adolescents, while perpetuating gendered stereotypes such as the idea that women's and under-age females' bodies are for sale to satisfy male demand for sex; and, stressed that prostitution markets fuel trafficking in women and children. See Mary Honeyball, Committee on Women's Rights and Gender Equality, European Parliament, *Report on sexual exploitation and prostitution and its impact on gender equality*, *supra* note 20.

⁵⁸ Council of Europe, Resolution 1983, *Prostitution, trafficking and modern slavery in Europe*, Text Adopted (2014), online: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20716&lang=en>.

⁵⁹ Committee on the Elimination of All Forms of Discrimination against women, 8 February 2014, REC C/FIN/CO/7, online: <http://formin.finland.fi/public/download.aspx?ID=127460&GUID=%7B50D3AE8D-B478-40D7-8B71-6EE474410022%7D>. See Committee on the Elimination of All Forms of Discrimination against women, 9 March 2012, REC C/NOR/CO/8, online: <http://www.fokus.vinnec.no/PageFiles/3379/CEDAW-C-NOR-CO-8.pdf>. Committee on the Elimination of All Forms of Discrimination against women, 30 July 2010, REC C/AUS/CO/7, online: <http://www.refworld.org/publisher/CEDAW/CONCOBSEVATIONS/AUS/52dd07654.0.html>.

⁶⁰ National Public Investigations, Swedish Institute, "Prohibiting the purchase of sexual services: An evaluation 1999-2008", Report of the Commission on the evaluation of prohibiting the purchase of sexual service (SOU, 2010: 49), at 2, online: <http://www.government.se/content/1/c6/15/14/88/0e31eb7f.pdf> [English summary].

⁶¹ *Ibid* at 7-10.

⁶² Conseil du statut de la femme, *supra* note 12 at 90-100. See G. Ekberg, "Swedish Laws and Policies on Prostitution and Trafficking in Human Beings: An Overview. 2013", online: <http://www.sccir.ac.uk/wp-content/uploads/2011/12/Briefing-Law-and-policies-on-prostitution-and-THB-Sweden-Gunilla-S.-Ekberg-130704.pdf>. See M. Waltman, "Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law" (2010) 63:1 Political Research Quarterly 218-73, online: <http://su.diva-portal.org/smash/get/diva2:460417/FULLTEXT01>. See Working Group on the Legal Regulation of the Purchase of Sexual Services (Norway), "Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences" [Abbreviated English Version] (Oslo, Norway: Ministry of Justice and the Police, 2004), online: http://www.regjeringen.no/upload/kilde/jd/rap.2004/0034-ddd/pdf/v.232216-purchasing_sexual_services_in_sweden_and_the_netherlands.pdf. See Kajsa Wahlberg, "Trafficking in human beings for sexual and other purposes" (Situation report 13: Swedish National Police Board, 2012) at 21. See Joy Smith, "The Tipping Point: Tackling the Demand for Prostituted/Trafficked Women and Youth" 1st Report. (Canada: MP Kildonan – St. Paul, 2014), online: http://www.joysmith.ca/main.asp?fxoid=FXMenu,4&cat_ID=27&sub_ID=131&sub2_ID=70. See March 8 Initiative, "The Effects of the Swedish Ban on the Purchase of Sexual Services" (2012), online: http://www.regjeringen.no/upload/kilde/jd/rap.2004/0034-ddd/pdf/v.232216-purchasing_sexual_services_in_sweden_and_the_netherlands.pdf. See Evangelical Fellowship of Canada. Out of Business: Prostitution in Canada – Putting an End to Demand. Ottawa, (Canada: Centre for Faith and Public Life, 2013), online: <http://files.efc-canada.net/si/Prostitution%20of%20Business.pdf>.

⁶³ National Public Investigations, *supra* note 60. See G. Ekberg, *supra* note 62. See M. Waltman, *supra* note 62.

⁶⁴ *Ibid* at 9. See G. Ekberg, *supra* note 62. See M. Waltman, *supra* note 62. See Hannah Carrigg, "Prostitution Regimes in the Netherlands and Sweden: Their Impact on the Trafficking of Women and Children in Illicit Sex Industries" (2008) 8 Monitor 6, online: <http://web.wm.edu/so/monitor/issues/14-1/1-carrigg.pdf>. See Kaja Claude, "Targeting the sex buyer—the Swedish example: stopping Prostitution and trafficking where it all begins" (2014), prepared for: The Swedish Institute, online: <https://eng.si.se/wp-content/uploads/sites/4/2013/02/Targeting-the-sex-buyer-English.pdf>.

⁶⁵ Jay Levy & Pye Jakobsson, "Abolitionist Feminism as Patriarchal Control: Swedish Understandings of Prostitution and Trafficking" (2013) 37: 2 Dialectical Anthropology 333-340. See Daniela Danna, "Client-only Criminalization in the City of Stockholm: A Local Research on the Application of the "Swedish Model" of Prostitution Policy" (2012) 9:1 Sexuality Research and Social Policy 80-93. See Sandra Chu, Ka Hon & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 Alberta Law

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⁶⁶ Liz Kelly, Maddy Coy & Rebecca Davenport, "Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries" *supra* note 16 at 37.

⁶⁷ Conseil du statut de la femme, *supra* note 12 at 88-90. See Janice G Raymond et al., "A Comparative Study of Women Trafficked in the Migration Process: Patterns, Profiles and Health Consequences of Sexual Exploitation in Five Countries (Indonesia, the Philippines, Thailand, Venezuela, and the United States)" *supra* note 20 at 150-51. See Janice G Raymond, "Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution" (2004) 3:4 Journal of Trauma Practice 2 315 at 4-5.

⁶⁸ *Ibid* at 89. See Janice G Raymond et al., "A Comparative Study of Women Trafficked in the Migration Process: Patterns, Profiles and Health Consequences of Sexual Exploitation in Five Countries (Indonesia, the Philippines, Thailand, Venezuela, and the United States)" *supra* note 20 at 150-51. See Working Group on the Legal Regulation of the Purchase of Sexual Services, "Purchasing Sexual Services in Sweden and the Netherlands" *supra* note 62.

⁶⁹ Liz Kelly, Maddy Coy & Rebecca Davenport, "Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries" *supra* note 16 at 61-2. See Janice G Raymond et al., "A Comparative Study of Women Trafficked in the Migration Process: Patterns, Profiles and Health Consequences of Sexual Exploitation in Five Countries (Indonesia, the Philippines, Thailand, Venezuela, and the United States)" *supra* note 20 at 150-51. See Mary Honeyball, Committee on Women's Rights and Gender Equality, European Parliament, *Report on sexual exploitation and prostitution and its impact on gender equality*, *supra* note 20. See Working Group on the Legal Regulation of the Purchase of Sexual Services (Norway), *supra* note 62. See Janice G Raymond, "Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution" *supra* note 67.

⁷⁰ Liz Kelly, Maddy Coy & Rebecca Davenport, "Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries" *supra* note 16 at 47, 50-3. See Joyce Outshoorn, "Policy Change in Prostitution in the Netherlands: From Legalization to Strict Control" (2012) 9 Sex Research and Social Policy 233 at 242, online: [http://www.nswp.org/sites/nswp.org/files/fulltext1%20\(2\).pdf](http://www.nswp.org/sites/nswp.org/files/fulltext1%20(2).pdf). See New Zealand Government Prostitution Law Review Committee, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act*, *supra* note 16 at 58 & 69. See Melissa Farley, "Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized" (2004) *supra* note 16.

⁷¹ Niklas Jakobsson and Andreas Kotsadam, "Prostitution Laws and Trafficking for Sexual Exploitation" (2010) University of Gothenburg, Working Papers in Economics, no. 458 (Revised in 2013), online: https://gupea.ub.gu.se/bitstream/2077/22825/4/gupea_2077_22825_4.pdf. See Seo-Young Cho, Axel Dreher & Eric Neumayer, "Does Legalized Prostitution Increase Human Trafficking?" (2013) 41 World Development 67, online: <http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Article-for-World-Development-prostitution-anonymous-REVISED.pdf>.

ANNEX A

Online Public Consultation on Prostitution-Related Offences in Canada



**Online Public Consultation on
Prostitution-Related Offences in Canada
Final Results**

**Research and Statistics Division
Department of Justice Canada**

2014

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Online Public Consultation on Prostitution-Related Offences in Canada

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Online Public Consultation on Prostitution-Related Offences in Canada

1. Background

On February 17, 2014, on direction from the Minister of Justice, the Department launched a month-long online public consultation on prostitution-related offences in Canada. The consultation was open to all Canadians and sought their input to inform the response to the Bedford Decision.¹ A national news release, as well as Facebook and Twitter posts, served to draw public attention to the consultation Web page. A discussion paper was provided on the consultation Web page, including background information, context on existing criminal laws governing prostitution and information on models that have been implemented in other countries.

Internationally, the law generally treats prostitution in one of three ways:

- **Decriminalization/legalization:** seeks to reduce the harms associated with prostitution by decriminalizing both the purchase and sale of sexual services and regulating the way in which prostitution takes place (implemented in Germany, the Netherlands, New Zealand and Australia);
- **Prohibition:** seeks to eradicate prostitution through the prohibition of both the purchase and sale of sexual services, as well as the involvement of third parties in prostitution (implemented in the U.S.A., except in Nevada); and
- **Abolition (the "Nordic Model"):** seeks to abolish prostitution through criminalization of those who exploit prostitutes (clients and third parties) and decriminalization of prostitutes themselves, who are viewed as victims of sexual exploitation and assisted through programs (implemented in Sweden, Norway and Iceland).

¹ The Supreme Court of Canada's decision in *Bedford v. Attorney General of Canada* found three *Criminal Code* prostitution provisions unconstitutional:

- the bawdy house offence with respect to the practice of prostitution (section 210 prohibits keeping and being an inmate of or found in a bawdy house);
- the living on the avails offence (paragraph 212(1)(j), which prohibits living in whole or in part on the earnings of prostitutes); and
- the communicating offence (paragraph 213(1)(c), which prohibits communicating in a public place for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute).

The Supreme Court found that these offences violate prostitutes' right to security of the person, as protected by section 7 of the Charter, by preventing them from taking measures to protect themselves while engaging in a risky, but legal, activity. Such protective measures include selling sexual services indoors, hiring bodyguards and drivers, and negotiating safer conditions for the sale of sexual services in public places.

The Supreme Court's decision does not take effect for one year. If there is no legislative response, the result of this decision would be decriminalization of most adult prostitution-related activities:

- indoor prostitution (e.g. in a house or apartment, massage parlour, or strip club);
- providing services to prostitutes (e.g. as a bodyguard or a driver); and
- communicating for the purposes of purchasing or selling sexual services in public places (e.g. in the street).

Online Public Consultation on Prostitution-Related Offences in Canada

Canadians were invited to respond to the online public consultation by filling out and submitting the online form or by sending an email directly to a "consultations-prostitution" email address. The consultation questions were as follows:

1. Do you think that **purchasing sexual services** from an adult should be a criminal offence? Should there be any exceptions? Please explain.
2. Do you think that **selling sexual services** by an adult should be a criminal offence? Should there be any exceptions? Please explain.
3. If you support allowing the sale or purchase of sexual services, **what limitations should there be**, if any, on where or how this can be conducted? Please explain.
4. Do you think that it should be a **criminal offence for a person to benefit economically** from the prostitution of an adult? Should there be any exceptions? Please explain.
5. Are there **any other comments** you wish to offer to inform the Government's response to the Bedford decision?
6. Are you writing on behalf of an organization? If so, please identify the organization and your title or role.

This research report outlines the results of the online public consultation, highlighting key findings related to the proportions of respondents who support or oppose criminalizing different aspects of prostitution. Canadians were invited and encouraged to participate in the consultation by way of a government news release and the use of social media throughout the consultation period.

2. Methodology

The Department's Research and Statistics Division compiled and analyzed responses to the online consultation. Throughout the course of the consultation, responses submitted via the online form were automatically transferred into a database for analysis. Analysis and roll-up of quantitative results were done using SAS (a statistical analysis program) and Microsoft Excel, with a combination of manual review and qualitative coding. The focus of the analysis was to identify the proportion of responses in which the respondent expressed a view in favour of or opposed to criminalizing different aspects of prostitution. This includes those who responded with "Yes" or "No" to the consultation questions, or those who expressed these views in different ways, e.g. "I don't think purchasing sex should be illegal."

3. Results

At the close of the online consultation on March 17, 2014, there were a total of 30,073 submissions to the online consultation form. There were also 959 direct emails sent to the

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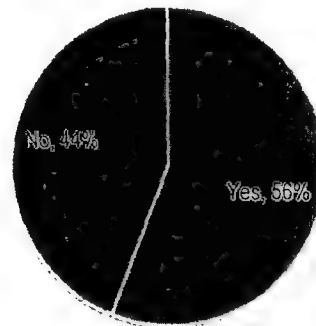
prostitution consultation email address.² As well, 140 responses were received via the Department's Ministerial Correspondence Unit, which includes responses forwarded to the Department of Justice via Status of Women Canada. Overall, a total of 31,172 responses were received.

7.1 Analysis of Consultation Questions

A total of 31,145 responses were analyzed, including online submission forms, direct email and paper submissions.³ This figure does not include the small number (27) of responses from individuals or groups outside of Canada.⁴

Question 1 asked whether respondents think that **purchasing sexual services** should be a criminal offence. Chart 1 shows that more than half (56%, or 15,993 known responses) felt that this activity should be a criminal offence, and 44% (12,418 known responses) felt that it should not.

Chart 1
Should purchasing sexual services be a criminal offence?



*Unknown/missing responses are not included and account for 9% of all responses.⁵

² This excludes emails that have no discernible feedback on prostitution (e.g. spam) but includes emails that discuss prostitution, even if they do not provide responses to the consultation questions, or advocate for a particular approach. Also, for groupings of responses that came in one email (e.g. a petition signed by multiple individuals), each individual response is counted separately.

³ Note that each question has a different number of total responses depending on the number of unknown/missing responses.

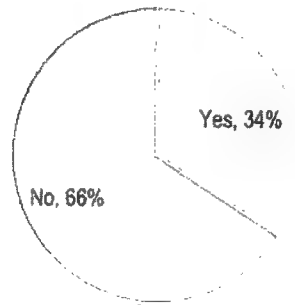
⁴ Twenty-seven of the responses to the online form were identified as having been submitted from an individual or group from outside of Canada (those that self-identified through their response to question 6). These responses are not included in the analysis, but have been reviewed separately.

⁵ These include responses that were left blank or worded in a way that did not allow them to be coded as "yes/no."

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Question 2 asked whether respondents think that selling sexual services should be a criminal offence. Two-thirds of respondents (66%, or 17,801 known responses) felt that it should not be a criminal offence to sell sexual services, and 34% (9,121 known responses) felt that it should be a criminal offence (Chart 2).

Chart 2
Should selling sexual services be a criminal offence?



*Unknown/missing responses are not included and account for 14% of all responses.⁶

Question 3 asked whether those who support the sale or purchase of sexual services felt there should be any limitations on where and how it can be conducted. A keyword search was used to identify the types of limitations that respondents who answered this question felt should apply to where and how prostitution is conducted. Table 1 presents the number of times each of these keywords were mentioned, from most frequent to least frequent.

The most commonly mentioned limitations were related to public health. In particular, sexually transmitted disease/infection (STD/STI) testing was mentioned, with respondents highlighting the importance of health inspections of brothels and regular medical testing for those who provide sexual services. "Regulation, taxation and licensing" was the next largest category of responses, with respondents suggesting that taxation and licensing of those who provide sexual services were important. The terms "brothel," "bawdy house" and "red light" were often mentioned, with most of these respondents suggesting that prostitution should only take place in these contexts. The terms "street," "school," "residential" and "neighbourhood" were mentioned mostly by respondents opposing street-based prostitution or prostitution taking place in residential areas or near schools. Age was mentioned by respondents indicating that those who provide sexual services must be over a certain age (either the age of majority or over 21).

⁶ These include responses that were left blank or worded in a way that did not allow them to be coded as "yes/no."

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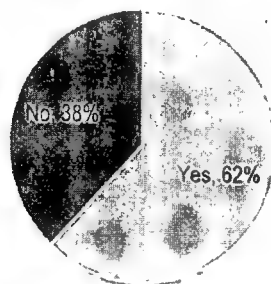
Table 1

What limitations should there be on how the sale or purchase of sexual services is conducted?	
Limitations	Number of times mentioned
Health Concerns (STD/STI)	6,431
Regulation/Taxation/Licensing	3,693
Street/ Schools/Neighbourhood/Residential	3,637
Brothel/Bawdy House/Red light	3,065
Age ("age of majority")	868

Question 4 asked respondents whether they think it should be a **criminal offence to benefit economically from the prostitution** of an adult. Almost two-thirds of respondents (62%, or 15,293 known responses) felt that it should be a criminal offence to benefit economically from the prostitution of an adult, whereas 38% (9,384 known responses) felt that it should not be a criminal offence (Chart 3). Many responses to this question, however, indicated that those who provide sexual services should be able to hire bodyguards and drivers, but that exploitive relationships (e.g. pimps) should be illegal.

Chart 3

Do you think that it should be a criminal offence to benefit economically from the prostitution of an adult?



*Unknown/missing responses are not included and account for 21% of all responses.⁷

⁷ These include responses that were left blank or worded in a way that did not allow them to be coded as "yes/no."

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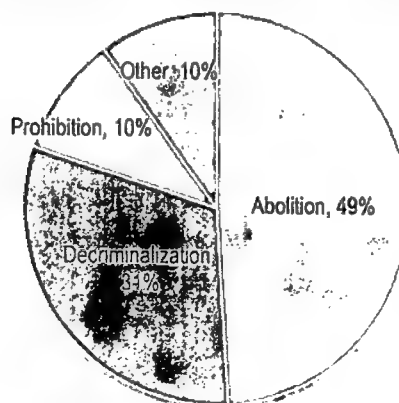
3.2 Responses from Organizations

A total of 117 organizations were identified as having submitted a response to the consultation. Groups that provide education, public awareness and/or front-line support and services, groups representing those who provide sexual services, police forces, municipalities and faith-based organizations were among the represented organizations. For reasons of confidentiality, the names of individuals or organizations who contributed to the online consultation are not being made public.

In order to identify these responses, a search of the database was conducted to identify those who answered "yes" to question 6, which asked whether the respondent was representing an organization. In addition, a keyword search was conducted using terms that would be used by someone responding on behalf of a group/organization (e.g. "behalf," "founder," "director," "president").

Overall, 57 organizations (49%) out of 117 supported the abolitionist approach or Nordic Model, and 36 (31%) supported decriminalization. The remainder either supported prohibition (12, or 10%) or provided more general comments that didn't necessarily directly correlate with abolition, decriminalization or prohibition (12, or 10%).

Chart 4
Responses from organizations by approach



4. Conclusion

The volume of responses to the Department's online consultation on prostitution-related offences is indicative of the significant level of public interest in, and engagement on, the issue of prostitution in Canada. The results show the following:

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- a majority (56%) of respondents felt that purchasing sexual services should be a criminal offence (44% felt it should not be);
- a majority (66%) felt that selling sexual services should not be a criminal offence (34% felt it should be); and
- a majority (62%) felt that benefiting economically from the prostitution of an adult should be a criminal offence (38% felt it should not be).

ANNEX B

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ANNEX C

News Release

Backgrounder



Department of Justice
Canada

Ministère de la Justice
Canada

News Release

For Immediate Release

Statement by the Minister of Justice Regarding Legislation in Response to the Supreme Court of Canada Ruling in *Attorney General of Canada v. Bedford et al*

June 4 2014 Ottawa Justice Canada

Today, the Honourable Peter MacKay, P.C., Q.C., M.P. for Central Nova, Minister of Justice and Attorney General of Canada, issued the following statement:

"Our Government remains committed to keeping our streets and communities safe by cracking down on those who fuel demand for prostitution. Today, our Government is responding to the Supreme Court of Canada's ruling in *Canada v. Bedford* to ensure that Canada's laws and the criminal justice system continue to address the significant harms that flow from prostitution to those engaged in prostitution and to other vulnerable persons, while protecting Canadian communities.

"The *Protection of Communities and Exploited Persons Act* is a "made-in-Canada" model, which directly targets the demand for this dangerous activity. The Act would introduce tough action to crack down on pimps and johns. For the first time, the purchase of sexual services would be criminalized, with tough penalties for those who exploit others through prostitution. The proposed legislation would also protect and safeguard our communities—in particular women, children, and those who are at risk of being drawn into prostitution—from the dangers associated with prostitution, including violence, drug-related crime, and organized crime.

"This model involves a significant overhaul of the *Criminal Code's* treatment of prostitution and related activities. It would:

- Criminalize those who fuel the demand for prostitution, i.e. purchasers of sexual services;
- Continue to criminalize those who financially benefit from the exploitation of others through prostitution, such as pimps, and those who procure others for the purpose of prostitution;
- Prohibit advertising for the sale of others' sexual services in print or online;
- Immunize those who sell their own sexual services from criminal liability for any part they play in the purchasing, material benefit, procuring or advertising offences;
- Protect our communities by criminalizing communicating for the purpose of selling sexual services in public places where a child could reasonably be expected to be present; and
- Increase existing penalties relating to child prostitution.

"These measures will be supported by \$20 million in new funding, including to support grassroots organizations dealing with the most vulnerable. Assistance will be provided to those who want to leave this dangerous and harmful activity; therefore, there will be an emphasis on funding programs that can help individuals exit prostitution.

"Today our Government is making prostitution illegal for the first time; the impact of the new prohibitions will be borne by those who purchase sex and persons who exploit others through prostitution. Prostitution hurts Canadian communities and the most vulnerable Canadians. We are committed to protecting Canadian communities by making it illegal to communicate for the purpose of selling sexual services in or near any public place where children could be present."

"In the *Bedford* ruling, the Supreme Court of Canada suspended its declaration of invalidity of three prostitution-related provisions of the *Criminal Code* for 12 months, or until December 19, 2014. We have introduced this legislation today, well ahead of that date, in an effort to ensure that it is adopted and starts protecting those who are most vulnerable and at risk of the exploitation inherent in prostitution as soon as possible, while ensuring that Canadian streets and communities remain safe."

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Backgrounder

Protection of Communities and Exploited Persons Act

The Government of Canada's comprehensive and "made-in-Canada" approach to address prostitution includes two essential parts—criminal law reform, in response to the Supreme Court of Canada's decision in *Canada v. Bedford*, and support for vulnerable persons to help them leave prostitution. This two-pronged approach aims to criminalize those who fuel and perpetuate the demand for prostitution by purchasing sexual services, and to protect those who sell their own sexual services, vulnerable persons, and Canadian communities from the harms associated with prostitution. These harms include sexual exploitation, violence, and related criminal activities, such as human trafficking, organized crime and drug-related crime.

Objectives of the Proposed Legislation to Address Prostitution

The proposed law has the following objectives:

- Protecting those who sell their sexual services from exploitation;
- Protecting communities from the harms caused by prostitution; and
- Reducing the demand for sexual services.

To achieve these ends, the Government of Canada is proposing new offences and modernizing existing offences.

Proposed New Prostitution-Related Offences

The proposed new prostitution-related offences are aimed at reducing demand for sexual services, protecting those who sell those services from exploitation, and protecting children and our communities from exposure to prostitution.

- **Purchasing sexual services** — This new offence would prohibit the purchase of sexual services and communicating in any place for that purpose. Maximum penalties for purchasing sexual services would be 18 months imprisonment on summary conviction and 5 years imprisonment on indictment. Escalating mandatory minimum fines for first and subsequent offences would also apply. There would be a \$500 fine for a first offence and a \$1,000 fine for a subsequent offence on summary conviction. These fines would be doubled if the offence were committed near parks, schools, religious institutions or other places where children could reasonably be expected to be present.
- **Receiving a financial or material benefit** — This new offence would prohibit profiting from the prostitution of others, including through businesses that sell the sexual services of others online or out of venues such as escort agencies, massage parlours, or strip clubs that also provide sexual services. It would carry a maximum penalty of 10 years imprisonment. Exceptions would be made for non-exploitative relationships.

- **Advertising the sale of sexual services** — This new offence would prohibit advertising the sale of others' sexual services in print media or on the Internet. It would give courts the power to authorize the seizure of materials containing such advertisements, to order an advertisement to be removed from the Internet, and to require the provision of information that would identify and locate the person who posted it. Maximum penalties for advertising the sale of sexual services would be 18 months imprisonment on summary conviction and 5 years imprisonment on indictment.
- **Communicating for the purpose of selling sexual services in public places where a child could reasonably be expected to be present** — This new offence would prohibit anyone from communicating for the purpose of selling sexual services in public places where a child could reasonably be expected to be present. The maximum penalty for this offence would be 6 months imprisonment.

Reformulating and Modernizing Existing Prostitution-Related Offences

The Government of Canada proposes reformulating and modernizing the following prostitution-related offences:

- **Procuring (also known as "pimping")** — This offence would prohibit a person from recruiting or harbouring another person for the purposes of prostitution. The proposed legislation would increase the current maximum penalty of 10 years imprisonment to 14 years. This offence would be modernized to be consistent with the new offence of receiving a financial or material benefit.
- **Child prostitution (and related offences)** — The proposed legislation would increase the maximum penalty for purchasing sexual services from children to 10 years imprisonment from the current 5 years and increase the mandatory minimum penalty for subsequent offences from six months to one year. The laws around child prostitution would also be modernized to be consistent with the proposed new legislative changes.
- **Child trafficking (and related offences)** — The legislation would increase the minimum and maximum penalties for two child trafficking offences to ensure consistency of penalties between child trafficking and child prostitution offences.

Exceptions to Proposed Prostitution-Related Offences

Prostitution is an inherently dangerous activity that puts those who sell their own sexual services at risk of exploitation. These individuals would be expressly protected from criminal liability that could otherwise result from activities in relation to their own prostitution, except in circumstances where a person communicates in a public place for the purpose of selling their own sexual services where a person under the age of 18 could reasonably be expected to be present. With this approach, these persons will be more likely to report problems to police, without fear of facing criminal charges for selling sexual services or communicating for that purpose.

The new legislation would clarify that sellers of their own sexual services have the same ability to conduct their own personal affairs as anyone else. The proposed financial or material benefit offence would not apply to persons who have entered into legitimate living arrangements with prostitutes; for example, spouses or roommates. It would also not apply to children or other dependants. Persons such as pharmacists, accountants or firms and individuals that offer security services would also be exempt from the proposed financial or material benefit offence in certain circumstances that do not involve exploitation.

Other Proposed Amendments to the Criminal Code

To protect potential victims of assault, the proposed legislation would also clarify that it is an offence to possess weapons of restraint with the intent to commit an offence. The Bill would amend the definition of "weapon" in the Criminal Code to include anything used or intended to be used to restrain a person against their will (e.g. handcuffs, rope, duct tape). This amendment would provide greater protection to all potential victims of assault, including to those who sell their sexual services, who are particularly vulnerable to violence and sexual assault.

Programs to Address Prostitution

These measures will be supported by \$20 million in new funding, including to support grassroots organizations dealing with the most vulnerable. Assistance will be provided to those who want to leave this dangerous and harmful activity; therefore, there will be an emphasis on funding programs that can help individuals exit prostitution.

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Department of Justice Canada

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